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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-4361

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC. and N-TRIPLE-C, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

PAUL RODGERS
General Counsel

CHARLES A. SCHNEIDER
Assistant General Counsel

WILLIAM R. NUSBAUM
Deputy Assistant General Counsel

National Association of Regulatory Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 628-7324

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari in the above-entitled cause. In support of its Motion, the NARUC shows:

Consent to the filing of a brief in this cause by the NARUC was sought from the parties to the proceedings in the court below. Consents were obtained from several of those parties. However, the consent of the Respondents, MCI Telecommunications Corporation, Microwave

Communications, Inc. and N-Triple-C, Inc., has been refused.

The National Association of Regulatory Utility Commissioners is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the 50 States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged, pursuant to duly adopted legislation, in the regulation of telecommunications common carriers and other public utilities within their respective borders. The mission of the NARUC is to improve the quality and effectiveness of regulation of public utilities throughout the United States and, through the governmental agencies which make up its membership, to maintain for the use of the public such telecommunications services and facilities as may be required by the public convenience and necessity and to insure the continued availability of those services and facilities at rates which are just and reasonable. "Congress and the FCC have long recognized that the State utilities commissions are the appropriate parties to represent their respective States in this effort," and therefore, "Congress has accorded NARUC official status as the representative of State regulatory agencies in dealing with the basic problem"[1] of maintaining widely available, low cost, local telephone service.

This case is before this Court on a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals had before it a petition for review, initiated by MCI Telecommunications Corporation, Microwave Communications, Inc. and N-Triple-C, Inc. (MCI), of a decision of the Federal Communications Commission (FCC) holding that MCI had exceeded its authorization, limited to the offering of private line services, by providing a service called "Execunet",

[1] *Washington Utilities & Transp. Comm'n* v. *FCC*, 513 F.2d 1142, 1148, 1154 n. 17 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

which the FCC found was not a private line service at all but instead was the equivalent of message telephone service (ordinary long distance service). *MCI Telecommunications Corp. Investigation Into the Lawfulness of Tariff FCC No. 1 Insofar as it Purports to Offer Execunet Service*, 60 F.C.C.2d 25 (1976). The FCC's decision with respect to Execunet was predicated upon its earlier decision, *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), in which it had articulated the findings and evidence in support of its conclusion that the entry of MCI and other specialized common carriers, limited to the offering of private line services, was in the public interest. That decision was affirmed by the Court of Appeals for the Ninth Circuit in a decision which this Court elected not to review further. *Washington Utilities & Transp. Comm'n.* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). In disregard of those decisions and the FCC's continued rearticulation and reapplication of its now settled policy determination limiting MCI and other specialized common carriers to the provision of private line services, the Court of Appeals below held that MCI, and presumably all other specialized common carriers, are not limited to the offering of private line services and can offer ordinary long distance service and any other services they choose between and among the states throughout the country.

The NARUC and the State utilities commissions that comprise its membership have an historic and vital interest in the disposition of the Petition for Writ of Certiorari now pending before this Court. The decision of the Court of Appeals, by improperly setting aside the FCC's determination that MCI was not and is not authorized to provide Execunet service and, thereby, for the first time permitting competition for message telephone service in addition to private line service, will have a direct and potentially staggering effect both upon regulatory policies developed over decades to promote the availability of local telephone

service at reasonable rates and upon the rates for those services themselves.[2] The nature of NARUC's concern about the effects of such competition, even as limited by the FCC, was most eloquently stated by a long-time, former member of one of the State commissions comprising the NARUC in testimony before Congress:

> At present, the state regulator is able to design rates in a way that the charge for the basic services — i.e. for the use of his telephone by the average householder — is held low, while other charges, such as for terminal facilities, extensions, PBX's, etc., are kept higher. Also, residential rates are invariably kept lower than business rates. These rate policies are not new, but historical, and have served the nation well.
>
> But now these new — and I can only call them selfish — interests have appeared with the clear intention of under-pricing in those special areas in which regulators have heretofore kept the prices higher; kept them higher in order to provide lower, though reasonable, charges for the

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[2] In its own investigation of the impact of such competition concluded in early 1974, the NARUC's Committee on Communications, after formal hearings and based upon extensive submissions by a number of parties, estimated that "the total annual costs shifted from interstate to intrastate jurisdictions as a result of SCC [Specialized Common Carrier] competition will reach a minimum of approximately $390 million annually by 1980, increasing to approximately $890 million annually by 1984. On a cumulative basis, the costs are estimated to exceed $1.1 billion by 1980, increasing to approximately $3.9 billion by 1984. Committee on Communications, National Association of Regulatory Utility Commissioners, Report After Investigation, p. 71 (May 15, 1974).

This estimate of the impact of the entry of competition for private line service did not contemplate the far more serious effect upon the interests of the States of the decision below permitting for the first time competition in the provision of message telephone service.

> great body of household telephone users across the country. Such competition may be good for these special interest entities which are not at all adverse to competing with a regulated system But it is not good, in my opinion, for the American public, especially the part of it which is economically disadvantaged — the unfortunate. It ties the regulator's hands as he attempts to set rates which will meet overall public interest standards — and especially the needs of the poor, the elderly, and the ill.
>
> To allow selective entry into this market by, for example, the specialized common carrier can only result in a further dislocation of present tenuous regulatory rate options. Regulators would then have no choice but to give greater weight than formerly to the cost of serving each class of customer with the result that a steeper rate of increase to the lower-income telephone user would be inescapable. Some may ask, 'What's wrong with that? This customer is only being asked to pay his fair share — what it costs to serve him.' What, in my opinion, — is wrong with it is that it lacks the input of responsible government with a social conscience — without which a government will not long be governing.[3]

This Court's disposition of this case will thus have a direct impact upon the ability of State regulatory commissions to discharge their responsibilities on behalf of the citizens within their respective borders. Accordingly, the NARUC submits that its participation in these proceedings is essential to insure the full and adequate representation of the in-

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[3] Testimony of Cyrus J. Colter, *Hearings on S. 1167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., pt. 5, at 3812-13 (1974).

terests of the State commissions of which it is comprised, as well as the interests of the public to whom those commissions are obligated to insure the continued availability of affordable telephone service.

Wherefore, it is respectfully requested that this Court grant leave for the filing of a brief by the National Association of Regulatory Utility Commissioners, as *amicus curiae*, in this case.

Dated this 27 day of September, 1977.

PAUL RODGERS
General Counsel

CHARLES A. SCHNEIDER
Assistant General Counsel

WILLIAM R. NUSBAUM
Deputy Assistant
General Counsel

National Association of
Regulatory Utility
Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 628-7324

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners submits, as provided by Rule 42 of the Rules of this Court, the following brief *amicus curiae* in support of the Petition For Writ of Certiorari filed by the Federal Communications Commission.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated July 28, 1977, is not reported. The opinion of the Federal Communications Commission is reported at 60 F.C.C.2d 25 (1976).

QUESTION PRESENTED

This case presents questions vital to the NARUC and to consumers throughout the United States whose telephone rates and service are regulated by State regulatory commissions comprising the NARUC. In the *Specialized Common Carrier* decision [29 F.C.C.2d 870 (1971)], after carefully balancing the public interest considerations advanced by the NARUC and the numerous other parties participating, the FCC concluded an exhaustive rulemaking proceeding by drawing a line permitting the entry of new carriers to provide private line services in competition with established carriers.[1] The Commission's findings and conclusions that the line it had drawn was in the public interest were subsequently affirmed on judicial review, *Washington Utilities & Transportation Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836, 96 S. Ct. 62, 46 L.Ed.2d 54 (1975), and have been rearticulated and refined by the Commission in numerous proceedings since. In one

[1] There are three primary long distance telephone services: Message Telecommunications Service (MTS); Wide Area Telecommunications Service (WATS); and Private Line Services. MTS is ordinary long distance service in which the subscriber has access to all other telephones connected to the switched network and is charged for each message completed. WATS likewise offers access to all telephones connected to the switched network in a given geographical area for a monthly charge related to the area covered and the extent of usage. In marked contrast to MTS and WATS, Private Line Service does not afford the subscriber access to all other telephones connected to the switched network. Instead it enables specific telephones to be connected by "leased" or "dedicated" circuits on a continuous basis for a flat charge per month.

such proceeding, *MCI Telecommunications Corp., Investigation Into the Lawfulness of Tariff FCC No. 1 Insofar as it Purports to Offer Execunet Service*, 60 F.C.C.2d 25 (1976), the Commission applied its policy determination limiting specialized common carriers to the provision of private line services by ordering MCI to discontinue the offering of a service known as "Execunet" because it was not a private line service and therefore exceeded MCI's authorization under the *Specialized Common Carrier* decision. The decision of the United States Court of Appeals for the District of Columbia Circuit setting aside the Commission's decision with respect to Execunet, on the ground that it was unsupported by adequate public interest findings that limited MCI's authorization to private line services, thus presents the following question:

> Whether the Court of Appeals decision, setting aside a decision of the Federal Communications Commission for not having made the requisite public interest findings required to limit MCI's authorization and to order MCI to cease and desist from offering a service which exceeded its authorization, is in conflict with decisions of this Court and the Court of Appeals which have regularly approved the action of administrative agencies rejecting a course of conduct, whether proposed or in effect, on the ground that it is inconsistent with a prior agency policy, without requiring the agency to repeat the evidence and findings upon which that policy was based?

INTEREST OF AMICUS CURIAE

The interests of the NARUC as *amicus curiae* are set forth in the attached motion for leave to file this brief.

STATEMENT

With the sanction of State legislators, and following the passage by Congress of the Communications Act of 1934, telecommunications services have historically been provided on a monopoly basis by the Bell System companies and independent companies with general service responsibilities subject to pervasive State and Federal regulation in the public interest. Beginning with its decision in *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), *recon. denied*, 21 F.C.C.2d 190 (1970),[2] the FCC initiated an abrupt but limited departure from this policy by permitting the entry of a small carrier proposing to offer point-to-point private line services between Chicago and St. Louis, upon finding that its entry would serve the public interest in providing "its subscribers limited common carrier microwave radio service, designed to meet the interoffice and interplant communications needs of small businesses". 18 F.C.C. 2d at 953. The limited nature of the authorization which MCI sought and the FCC granted was apparent from MCI's pleadings, where it acknowledged that it "is not offering a public switched telephone service. It cannot and will not have any effect on the public switched telephone network . . .".[3]

Following that decision, the FCC instituted its *Specialized Common Carrier* rulemaking proceeding in July, 1970, to determine the need for and ground rules of entry by a large number of applicants seeking authorization to construct microwave facilities to provide specialized point-to-point private line services over high density routes in various parts of the country in competition with the

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[2] F.C.C. Docket Nos. 16509-16519.

[3] MCI Opposition to Petitions for Reconsideration, F.C.C. Docket Nos. 16509-16519 (October 7, 1969) p. 14. (Supp. App. p.338). The foregoing reference to "Supp. App.", as well as those which follow, are to the Supplemental Appendix in the court below.

private line services offered by existing communications common carriers.[4] At that time there were 1,731 pending applications for microwave stations, and as of March 15, 1971, there were 33 applicants with 46 separate proposals for a total of 1,877 microwave stations. There was never any question that the applicants were seeking authority limited to the provision of private line service and were expressly disclaiming any intention of attempting to offer message telephone or exchange services. MCI itself stressed this very point:

> The exchange services offered by the telephone company are not similar in any way to the services which the Specialized Common Carriers propose to provide . . . . Specialized Common Carriers will provide only specialized point-to-point private line services.[5]

Despite the limited nature of the authorizations being sought, the NARUC urged the FCC not to permit new entry and the competition which would flow from it. The NARUC's principal concern was centered around the effect of new entry upon two basic regulatory policies, which had been developed through the cooperative efforts of State regulatory commissions and the FCC.[6] These policies

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[4] *In the Matter of Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendment to Parts 21, 43, and 61 of the Commission's Rules*, F.C.C. Docket No. 18920, 24 F.C.C.2d 318 (1970).

[5] MCI Comments, F.C.C. Docket No. 18920 (October 1, 1970), pp. 102-03 (Supp. App. p. 339).

[6] The Communications Act of 1934 was predicated upon a Congressional determination that the public interest required detailed regulation of the telephone industry to insure that common carriers

(continued)

governed the pricing of telephone services by the Bell System operating companies, and the independent, general service telephone companies, which together served as the exclusive providers of telephone services to the people of the United States.

The first policy involved rate and cost averaging. As first applied by the States and then by the FCC, rates for intercity communications services have traditionally been averaged on a statewide and on a nationwide basis, so that the rates charged for service between any two equidistant points are essentially the same, regardless of the specific costs of providing service along any given route.[7] The second of these policies, which was developed following this Court's decision in *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930), involved jurisdictional separations of telephone plant used jointly and in common to provide intrastate services and interstate message services and the assignment of the investment in that plant and certain other expenses to the respective jurisdictions involved.

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[6] (continued)
"make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" (47 U.S.C. §151). Congress recognized and preserved the pre-existing role of the States in regulating this vital industry and established a dual and cooperative regulatory scheme between the States and the FCC to insure its continued regulation in the public interest. Thus the Act provides that it is not to "be construed to apply or to give the Commission jurisdiction with respect to . . . charges . . . in connection with intrastate communication service . . ." (47 U.S.C. §152(b)(1)) and establishes a mechanism for coordination between the State regulatory agencies and the FCC through the creation of Joint Boards (47 U.S.C. §410).

[7] *See Washington Dept. of Pub. Serv.* v. *Pacific Tel. & Tel. Co.*, 8 F.C.C. 342, 363-364 (1941).

As these jurisdictional separations formulas evolved to the current procedures embodied in the Ozark Plan,[8] annual local plant costs are allocated between State and interstate jurisdictions as a function of the relative interstate and intrastate usage of message services by telephone subscribers. Because interstate message toll usage increased rapidly over the years, due to the price stability made possible by cost-saving technological improvements and the economies realized by aggregating demand on a single nationwide network, interstate message usage outpaced the growth of intrastate and local exchange usage. With the relatively greater increase in interstate message usage, a relatively greater proportion of local plant costs was allocated to the interstate rate bases of the Bell System and independent companies. Hence the result of these policies was that the State commissions comprising the NARUC were able to maintain the rates for local telephone service at lower levels than would otherwise be possible and thereby insure the widest availability of service to their citizens.

Given the nature of those policies, the NARUC believed that permitting the entry of MCI and other specialized common carriers, even if limited to the offering of private line services in competition with the Bell System and other established carriers, would threaten the continuing viability of the policies and the social objectives they were designed to serve. Because the specialized common carriers only proposed to offer private line services between major metropolitan areas that generated a high density of traffic, the effect of pre-existing rate and cost averaging and jurisdictional separation would permit the new entrants to underprice the non-cost related private line and message toll rates of the Bell System and other established carriers

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[8] *In the Matter of Prescription of Procedures for Separating and Allocating Plant Investment, Operating Expenses, Taxes and Reserves Between the Intrastate and the Interstate Operations of Telephone Companies*, 26 F.C.C.2d 247, 248 (1970).

and thus to cream-skim their rate structures.[9] Accordingly, the NARUC concluded that such competition would not only produce a diversion of the established carriers' private line traffic and a loss of the historical contribution that the revenue from that traffic had made to the joint and common costs of other services, but also would produce a diversion of message toll traffic, thereby yielding an increased allocation of costs, through separations procedures, to the intrastate jurisdictions. Moreover, the specialized common carriers were not subject to separations and could, therefore, engage in cream-skimming with impunity. Thus, the NARUC feared that the ultimate burden of the FCC's new policy would be borne by the average consumer, in the form of higher rates for local service — the singlemost important factor determining whether individuals can afford to have a telephone.

In its comments to the FCC in the *Specialized Common Carrier* proceeding the NARUC stressed that, if permitted, new entry would produce:

> . . . wasteful and destructive duplication of facilities, would divert revenues from existing common carriers, and, accordingly, the loss of such revenues would have to be recouped from the other communication users served by such

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[9] In *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n.* 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed. 993 (1951), this Court recognized the nature of the creamskimming problem where there is selective entry into regulated industries of the kind involved here:

> Appellant asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated.

341 U.S. at 334.

> carriers. This recoupment could impair the national uniformity of interstate rates for communications service and would increase the economic burden imposed upon the users of interstate and intrastate communications furnished by such carriers.[10]

The NARUC concluded its comments by stating:

> . . . Commission stimulation of competition — for competitions sake — will primarily benefit a relatively small number of businesses and other affluent users. The economies achieved by this favored few will result in the economic over burdening of the millions of local users across the Nation. These users will have no need for the "specialized" services but, nevertheless, they will be forced to shoulder a greater burden in supporting the existing common carriers whose revenues would be diverted in part by new competitors.[11]

In deciding its *Specialized Common Carrier* proceeding, the FCC was thus called upon to carefully weigh the concerns voiced by the NARUC, as well as the positions of numerous other participating parties, and to draw a line with respect to the scope of services of the new entrants which, in its judgment, would not undermine the policies of nationwide rate averaging and jurisdictional separations and the goals they were designed to serve. The FCC drew this line by holding that the entry of the specialized com-

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[10] NARUC Comments, F.C.C. Docket No. 18920, as quoted in NARUC Brief, *Washington Utilities & Transp. Comm'n* v. *FCC*, 9th Cir. No. 72-1198 (May 5, 1972), p. 11.

[11] NARUC Comments, F.C.C. Docket No. 18920, as quoted in NARUC Brief, *Washington Utilities & Transp. Com'n* v. *FCC*, 9th Cir. No. 72-1198 (May 5, 1972), p. 11.

mon carriers was in the public interest, so long as they were limited to the offering of private line services.

After emphasizing that "the MCI carriers and others all propose point-to-point facilities for private line services", 29 F.C.C.2d at 871, the FCC held:

> In light of all of the foregoing and the record as a whole, . . . we find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry.

29 F.C.C.2d at 920

Moreover, the FCC expressly found that, given the limited nature of the private line services being authorized, the "claims that competing carriers would simply be engaged in 'creamskimming' " appeared insubstantial. 29 F.C.C.2d at 910. Since the FCC had drawn its line to preclude the offering of message telephone service by the specialized common carriers and therefore stressed that "those services are not being challenged competitively to any substantial degree by the services proposed to be offered by the aspiring new entrants," it concluded that changes, if any, in pre-existing policies applicable to the pricing of telephone services would be limited to private line:

> There is no reason to believe that this approach to pricing of the interstate message service offerings of the Bell System and Western Union (such as MTS, WATS, and public telegraph) need be

> altered by new entry into the developing specialized communications market. Clearly, none of the uniform rate structures of the existing carriers for such services would appear to be in jeopardy since those services are not being challenged competititvely to any substantial degree by the services proposed to be offered by the aspiring new entrants. Where services may be in direct competition, departure from uniform nationwide pricing practices may be in order, and in such circumstances will not be opposed by the Commission.

29 F.C.C.2d at 915.

The Commission thus drew the line of allowed entry at private line service, *and no further,* after full consideration of the effect of such limited entry upon the public interest with respect to message telephone and WATS services.

Although the FCC had restricted the new entrants to the offering of private line services, the NARUC and the Washington Utilities and Transportation Commission continued to believe that new entry should not have been permitted at all and hence sought review of the FCC's decision in the Court of Appeals for the Ninth Circuit.[12] Because of the FCC's clear limitation of specialized common carriers to the offering of private line services, the Court of Appeals found that the issue before it involved the "business . . . of providing specialized private or leased line communication services through microwave transmission facilities, as distinguished from public exchange and long distance toll telephone service." 513 F.2d at 1155. Based upon that understanding, the Court of Appeals concluded that the FCC had proceeded properly by means of rulemaking to limit the class of telecommunications services within which com-

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[12] *Washington Utilities & Transp. Comm'n* v. *FCC,* 513 F.2d 1142 (9th Cir.), *cert. denied,* 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975).

petition was deemed to be in the public interest to private line services and that its findings were supported by the evidence of record:

> [T]he Commission may determine general questions relating to the public interest, convenience and necessity in rulemaking proceedings; and specifically, may determine that competition in the furnishing *of a class of regulated service* will lead not to poorer but to better service to the public, and will otherwise be in the public interest. (Emphasis supplied.)

513 F.2d at 1166.

MCI commenced commercial operations in January, 1972, offering point-to-point private line services pursuant to the authorizations granted by the FCC. Up to that time, MCI had plainly understood the limited nature of its authority and had expressly disclaimed any intention of seeking to exceed it by offering message telephone service. Precisely the same understanding existed for some period of time thereafter. Moreover, when a question arose late in 1973 concerning the extent to which MCI could use the local facilities of the Bell System companies to reach from its microwave towers to the premises of its customers, MCI reiterated to the Commission its understanding that "while the Commission concluded that it was feasible and desirable to have competing intercity systems for the provision of private line service . . . no one proposed — or authorized — the new carriers" to offer services other than private line.[13] In its resolution of this question, the FCC

[13] MCI Reply Brief, F.C.C. Docket No. 19896 (Feb. 4, 1974) p. 10. (Supp.App. p.341).

similarly underscored that its *Specialized Common Carrier* decision had only authorized the entry of the specialized carriers into the private line common carrier field.[14] The Court of Appeals for the Third Circuit affirmed the FCC's disposition of the local distribution question, predicating its decision upon the FCC's authorization of "the entry of specialized carriers into the full field of private line services." 503 F.2d at 1270.

The dispute over local distribution facilities was only one of many proceedings following its *Specialized Common Carrier* decision in which the FCC applied the line it had drawn there limiting the services the new carriers were authorized to provide to private line. Thus many subsequent applications seeking entry were routinely granted, including the application of United States Transmission Systems (a subsidiary of ITT), to offer specialized private line services.[15] In proceedings before the United States Court of Appeals for the District of Columbia Circuit to review the FCC's approval of that application, which had been granted without a hearing, the FCC reiterated the question it had resolved in the *Specialized Common Carrier* proceeding and where it had drawn the line:

> The Commisison in 1970 had pending a number of applications for microwave radio facilities, which were to be used for specialized common carrier services in various parts of the country.

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[14] *Bell System Tariff Offerings of Local Distribution Facilities* (F.C.C. Docket No. 19896), 46 F.C.C.2d 143 (1974), *aff'd. The Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, 95 S.Ct. 2620, 45 L.Ed.2d 684 (1975).

[15] *United States Transmission Systems, Inc.*, 48 F.C.C.2d 859 (1974), *aff'd. American Tel. & Tel. Co.* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976).

> The applicants proposed to offer a wide range of private line services . . . . They did not propose to offer ordinary long distance service or wide area telephone service (WATS).
>
> * * * *
>
> The open entry policy covered the full range of private line services . . . . [16]

In affirming the *USTS* decision,[17] the Court of Appeals recognized that it had been predicated upon what the FCC had decided in the *Specialized Common Carrier* proceeding:

> At issue in this case is the Commission's policy relating to private line communications services provided by specialized common carriers.
>
> * * * *
>
> [The FCC] concluded that there is a public need and demand for the proposed services, that it is likely that new entry will have some beneficial effects and little if any adverse impact on existing carriers, and 'that a general policy in favor of the entry of new carriers . . . would serve the public interest, convenience and necessity.

539 F.2d at 769-70.

Moreover, the court pointed to the FCC's recognition that "a certain amount of 'creamskimming' would naturally occur" even from competition limited to private line services and the FCC's "view [that] start-up difficulties . . . can adequately be controlled by carefully monitoring implementation of its policy." 539 F.2d at 774.

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[16] FCC Brief, *American Tel. & Tel. Co.* v. *FCC*, D.C. Cir. No. 74-1953 (April 23, 1975), pp. 3-4, 7.

[17] *American Tel & Tel. Co.* v. *FCC*, 539 F.2d 767 (D.C. Cir 1976).

Beyond its disposition of applications like that involved in *USTS*, a major part of the FCC's regulatory program applicable to the provision of intercity services had been based upon the line it drew in the *Specialized Common Carrier* proceeding limiting specialized common carriers to the provision of private line services. Thus, in its decision in Docket No. 18128, a major and recently concluded investigation into rate levels, rate relationships and appropriate pricing and costing methodologies to be employed by the Bell System, the FCC made clear that its " 'ratemaking and regulatory policies and practices' ", as well as its determination of "what constituted a proper costing methodology," had been molded in light of the scope of competition, limited to private line services, which it had previously authorized.[18] And in its decision authorizing the resale and shared use of common carrier services and facilities, the FCC stressed that it would not permit subversion of its previously articulated "distinctions between private line services and MTS or WATS" and thereby provide specialized common carriers "the opportunity for creation of networks similar to MTS and WATS"[19] Indeed, as the FCC recently pointed out in a comprehensive report to Congress, "the Commission carefully and consistently has restricted competition to the private line field . . . so that nationwide rate averaging will continue for long distance telephone service."[20]

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[18]*AT&T, Revisions of Tariff FCC No. 260 Private Line Services, Series 5000 (TELPAK)*, 61 F.C.C.2d 587 (1976).

[19]*In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976), *recon. granted*, 62 F.C.C.2d 588, 602-03 (1977).

[20]Report by the Federal Communications Commission on Domestic Telecommunications Policies, Attachment B, p. 101, September 27, 1976.

Notwithstanding the reiteration by the FCC and the recognition by the courts that specialized common carriers were limited to the offering of private line services, MCI modified its tariffs late in 1974 in a way that enabled it subsequently to offer message telephone service under the guise of Execunet. Because of the manner in which its tariff was amended and its failure adequately to describe or even name the service there, the nature of Execunet was not known until MCI began actively promoting the service some months later. When AT&T learned of the service and determined that it was indistinguishable from message telephone service, it filed a complaint with the FCC seeking to halt the offering of the service on the ground that it exceeded MCI's authorization limited to private line services.

In a lengthy decision rendered after extensive proceedings, the FCC held that Execunet is "indistinguishable from MTS" and hence "is outside of MCI's authorizations". *MCI Telecommunications Corporation, Investigation Into the Lawfulness of Tariff FCC No. 1 Insofar as it Purports to Offer Execunet Service*, 60 F.C.C. 2d 25 (1976). The Commission stressed that its conclusion concerning the scope of MCI's authorization was premised upon its "foremost pronouncement of our policy regarding the role of Specialized Common Carriers in . . . the *Specialized Common Carrier* decision . . . ," that it had "never modified this policy, but rather" that it had "reaffirmed . . . [its] findings therein on several occasions" and that those findings "are controlling on the issues in the case". 60 F.C.C.2d at 35-36. After pointing out that, "prior to the present proceeding, there had been no confusion or debate over the meaning of private line services", 60 F.C.C.2d at 42, and detailing the reasons why Execunet is "indistinguishable from MTS," the FCC concluded:

> In essence, MCI is . . . asking us to reopen the *Specialized Common Carrier* decision to determine again what services should be open to com-

> petition. We decline to do so . . . . There is no allegation that the public interest considerations upon which the *Specialized Common Carrier* decision were based have changed at all, nor that the economic character of the communications industry has changed so drastically that we should re-examine the industry structure.

60 F.C.C.2d at 57.

The decision of the Court of Appeals for the District of Columbia reversed the FCC's *Execunet* decision and remanded the case to the FCC for further unspecified proceedings. The court did not question the FCC's determination that Execunet is "indistinguishable from MTS" nor did it question that the FCC had not, at any time, even considered, much less authorized, specialized common carriers to provide message telephone serivce. Indeed, the court conceded that "even if the Commission was without power to reject a tariff as that phrase is used as a term of art, it was empowered to reject the Execunet tariff in a practical sense". Slip op. at 19. Nevertheless, the court concluded that MCI was free to offer any service it desired, without restriction, whether private line or MTS, on the ground that the *Specialized Common Carrier* decision cannot reasonably be read to have made an affirmative determination that the public convenience and necessity required 'private line restrictions on the facilities authorizations of specialized common carriers' ". Slip op. at 30.

As the NARUC will show, the Court of Appeals decision can only be described as an abberation which cannot be permitted to stand. Indeed the court's radical departure from settled precedent of this Court and the Court of Appeals portends profound effects upon the entire structure of the telecommunications industry and dire consequences for the NARUC, for the State regulatory commissions of which

it is comprised and for the general public, all without justification in law or logic.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE COURT OF APPEALS PERMITTING ADMINISTRATIVE AGENCIES TO UTILIZE RULEMAKING PROCEEDINGS TO ESTABLISH POLICIES FOR APPLICATION IN SUBSEQUENT PROCEEDINGS.

The basis for the Court of Appeals holding, setting aside the FCC's *Execunet* decision and permitting MCI to offer message telephone services as well as private line services, was that the FCC had failed to make findings of public convenience and necessity adequate to limit the authorizations of specialized common carriers to private line services. Slip op. at 30. Since such findings already had been made by the FCC in its *Specialized Common Carrier* decision, there appear to be only two possible explanations for the court's holding. First, the court apparently was of the view that, in reviewing the FCC's determination, it was limited to the four corners of the record made before the FCC in *Execunet* itself and therefore that it was not obligated to look beyond that proceeding itself to determine if the requisite findings had been made. Secondly, the court was also apparently of the view that the FCC could not, through a properly conducted rulemaking proceeding, establish a general rule concerning the scope of authorized competition and then apply that rule to tariffs offering services beyond the line previously established. Neither explanation will withstand analysis and each is flatly at odds with settled decisions of the Supreme Court and the Court of Appeals.

It has long been recognized that decisions of administrative agencies may not be overturned because a determination went beyond the record in the proceeding in question, unless there is actual prejudice to a party participating in the proceeding. This Court articulated this sound rule of administrative practice in *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 66 S.Ct. 687, 90 L.Ed. 821 (1946):

> [This Court] has not undertaken to make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings or of pinning down such agencies, with reference to fact determinations even more rigidly than the courts in strictly judicial proceedings. On the contrary . . . the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result.

327 U.S. at 530.

MCI can hardly claim and the Court of Appeals did not find that MCI was prejudiced in any way by what the Court erroneously perceived to be an absence of adequate public interest findings that the continued offering of Execunet exceeded MCI's limited authority to provide private line services. As the FCC itself pointed out, prior to *Execunet*, there had been "no confusion or debate" concerning whether the FCC had ever "modified" the policy it announced in its *Specialized Common Carrier* decision or whether the policy was still "controlling" or whether MCI's authority was limited to offering private line service. 60 F.C.C.2d at 35, 36, 42. Nor is the absence of confusion at all surprising, since MCI participated in each of the proceedings in which this question had been addressed by the FCC or the courts and had repeatedly represented its own understanding in those proceedings that its

authorization was so limited. By failing to take into account the extensive history leading up to the instant controversy reflected in the findings, conclusions and records of related proceedings, the court improperly elevated form over substance and made "a fetish of sticking squarely within the four corners of the specific record" of a kind this Court has squarely condemned. 327 U.S. at 530.

The Court of Appeals' total misapprehension of the nature and scope of the record before it on review of the FCC's decision led it similarly to misapprehend, contrary to a settled line of precedent, the function and purpose of rulemaking where an agency decision reflects the application of a rule after its promulgation. The landmark case establishing the proper scope of review of agency rulemaking, nowhere acknowledged by the Court of Appeals, is this Court's decision in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956). In upholding the FCC's exercise of rulemaking authority to limit the number of stations a licensee could own, this Court announced a principle that the NARUC submits is fully applicable to this case:

> This Commission, like other agencies, deals with the public interest. *Scripps-Howard Radio* v. *Federal Communications Comm'n*, 316 U.S. 4, 14, 86 L.Ed. 1229, 1236, 62 S.Ct. 875. Its authority covers new and rapidly developing fields. Congress sought to create regulation for public protection with careful provision to assure fair opportunity for open competition in the use of broadcasting facilities. Accordingly, we cannot interpret § 309(b) as barring rules that declare a present intent to limit the number of stations consistent with a permissible "concentration of control." It is but a rule that announced the commission's attitude on public protection against

> such concentration. The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions.

351 U.S. at 203.

As this Court stressed in *Storer*, in terms flatly inconsistent with what the Court of Appeals required here, "we do not think Congress intended the Commission to waste time on applications that do not store a valid basis for a hearing." 351 U.S. at 205. The plain meaning of the Court's holding in *Storer* is that once the FCC adopts a valid rule, it need not relitigate the underlying rationale for and again make findings supporting the rule adopted. Instead, all that is required of the agency is to determine whether the particular situation before it falls within or outside of the previously established rule. The FCC's conclusions concerning Execunet fully satisfy that requirement — having been reached after exhaustive proceedings in which all interested parties had the opportunity to and did participate.

In *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 84 S.Ct. 1105, 12 L.Ed.2d 112 (1964), this Court expanded upon the rule it announced in *Storer*. The question before the Court in *Texaco* was whether the FPC had properly adopted a rule requiring gas producers to file contracts as rate schedules, stipulating that only certain prescribed conditions in the contracts were permissible. and thereafter summarily rejecting applications that contained impermissible conditions. In upholding the FPC's action, this Court stated:

> The present regulations do not pass on the merits of any rate structure nor on the merits of a certificate of public convenience and necessity; they merely prescribe qualifications for applicants. Those qualifications are in the category of conditions that relate to the ability of applicants to serve the consumer interest in this regulated field.

377 U.S. at 42.

Having drawn a line by means of a rulemaking proceeding between the authorized and the unauthorized, as the FCC did in its *Specialized Common Carrier* decision and as the FPC did in *Texaco,* this Court made it crystal clear that unless the agency is free to apply that rule in the future, "the processes of regulation" would "be . . . prolonged and . . . crippled":

> To require the Commission to proceed only on a case-by-case basis would require it, so long as its policy outlawed indefinite price-changing provisions, to repeat in hearing after hearing its conclusions that condemn all of them. There would be a vast proliferation of hearings, for as a result of *Phillips Petroleum Co.,* v. *Wisconsin, 347 U.S. 672, 98 L.Ed. 1035, 74 S.Ct.* 794, there are thousands of individual producers seeking applications. See *Wisconsin v. Federal Power Comm'n,* 373 U.S. 294, 300, 10 L.Ed.2d 357, 362, 83 S.Ct. 1266. We see no reason why under this statutory scheme the process of regulation need be so prolonged and so crippled.

377 U.S. at 44.

Before its decision in the present case, the Court of Appeals for the District of Columbia Circuit had understood and applied this Court's teaching in *Storer* and *Texaco.* In *American Airlines, Inc.* v. *CAB, 359 F.2d 624 (D.C. Cir.),*

cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966), the court upheld the application of a policy statement previously adopted by the CAB to limit the kinds of carriers that could provide certain types of cargo service. The principal argument addressed by the court related to the meaning of the *Storer* doctrine. Petitioner there urged that "the doctrine is restricted to regulations affecting future applications for new licenses or certificates, whereas here the CAB affected rights under existing certificates". 359 F.2d at 628. The Court of Appeals flatly rejected "such a restrictive reading" of *Storer:*

> The present case is different in particular aspects of the facts or statutory provisions from *Storer* and the other *Storer* doctrine cases. However, the *Storer* doctrine is not to be revised or reshaped by reference to fortuitous circumstance. It rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

359 F.2d at 629.

Subsequently, in *American Telephone & Telegraph Co.* v. *FCC,* 539 F.2d 767 (D.C. Cir. 1976), the Court of Appeals applied precisely the same principle in approving the FCC's grant, without a hearing, of the application of United States Transmission Systems on the basis of the policy established in the *Specialized Common Carrier* decision:

> The Commission, of course, has "a large discretion to avoid time consuming hearings in this field whenever possible." *Southwestern Operating Co.* v. *FCC*, 122, U.S. App. D.C. 137, 128, 351, F.2d 834, 835 (1965); *Stone* v. *FCC*, 151, U.S. App. D.C. 145, 466 F.2d 316 (1972). Moreover, the *Commission may obviate the need for repetitious hearings on previously considered issues of public policy by establishing through rulemaking, criteria against which to judge specific applications. United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202-205, 76 S. Ct. 763, 100 L.Ed. 1081 (1956). Emphasis supplied.)

539 F.2d at 774.

In its decision below, the Court of Appeals totally disregarded the controlling decisions of this Court and its own prior decisions by the "importation of formalities" that have no proper place in the administrative process. By apparently requiring the FCC to redecide whether the line it drew in the *Specialized Common Carrier* decision remains consistent with the public interest — a needless task the FCC expressly declined to undertake in the context of Execunet, 60 F.C.C.2d at 57 — the court has made a mockery of the administrative process and turned the salutary purpose of a rulemaking proceeding on its head.

The practical effect of the court's erroneous decision is particularly disturbing. For one thing, it will result in further delay in an already drawn-out proceeding that can plainly serve no useful purpose.[21] Far more importantly,

[21] When and if MCI or some other specialized common carrier wishes to expand its authority, it can always return to the FCC and apply for a new or expanded certificate upon a showing that such expansion would serve the public interest. However, as the FCC pointed out in *Execunet*, "MCI has cited no changed circumstances which would require a re-examination of our policies regarding competition . . . as established in the *Specialized Common Carrier* decision". 60 F.C.C.2d at 57.

since other carriers previously limited by the FCC to the offering of private line services will in all probability seek to take advantage of the chaos introduced into the structure of the industry by the decision below, that decision jeopardizes the public interest in national rate averaging and the support message telephone revenues provide to local telephone service, unless it is stayed pending the action of this Court or further proceedings before the FCC.

The NARUC does not take issue with the abstract soundness of the court's discussion of the circumstances under which the FCC can reject a tariff and the requirements of the various provisions of the Communications Act which it addressed in that regard. Slip op. at 17-20. However, it is clear that the court erred in concluding that the FCC had engaged in an improper "departure from prior administrative practice", Slip. op. at 16, in rejecting MCI's tariff offering Execunet. Indeed, what the FCC did here was precisely the same as what it had done in an earlier case, *Press Wireless, Inc.*, 25 F.C.C. 446 (1958), *aff'd sub. nom. Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 (D.C. Cir. 1959), which the court cited in its opinion. Slip op. at 17. In *Press Wireless*, the FCC had refused to accept a tariff offering a service which was beyond those specified in a rule limiting the services that could be offered over certain radio facilities. In a *per curiam* opinion, the Court of Appeals affirmed, finding no error in the FCC rejecting a tariff that "the Commission thought . . . covered services petitioner was not licensed to perform". 264 F.2d at 372. Because the FCC properly drew a line in its *Specialized Common Carrier* decision limiting MCI and other specialized carriers to offering private line service, the practice it followed in rejecting MCI's Execunet tariff offering message telephone service was both sound, lawful and essential to protect the public interest.

CONCLUSION

For the foregoing reasons, the NARUC respectfully requests that this Court grant the Petition for Writ of Certiorari and summarily reverse the Court of Appeals decision.

PAUL RODGERS
General Counsel

CHARLES A. SCHNEIDER
Assistant General Counsel

WILLIAM R. NUSBAUM
Deputy Assistant General Counsel

National Association of Regulatory Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 628-7324

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